NG WENG, RE: EX P; D & C BANK BHD.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
30 AUGUST 1990

BANKRUPTCY: *Bankruptcy notice - Whether defective - Notice for greater amount than is legally due - Monies paid to the creditor bank represented the sum due to the debtor as vendor - Whether such payment from property transaction constituted an effective discharge of the debt - Notice issued to debtor alone - Liability based on guarantee - Creditor advanced monies to different entities from the debtor - Secured on first and second charges - Whether to constitute mutuality of debts - Bankruptcy Rules 1969, s. 95 - Contracts Act 1950, s. 60*

A bankruptcy notice dated 31 October 1988 was served on the debtor N at the bank's solicitor's office on the 6 December l989, for the amount of RM1,193,659 being the sum owed by the debtor as a guarantor under a final judgment. As N did not comply with the bankruptcy notice, the bank proceeded to file a creditors's petition seeking a receiving order against the debtor. Within seven days from the date of acceptance of the bankruptcy notice, the debtor affirmed and filed an affidavit contending that RM175,000 had already been paid towards the debt shown in the bankruptcy notice, and that the bank had agreed to accept RM1,750,000 in settlement of its debts and was estopped from proceeding further.

At the material time when the bank was instituting bankruptcy proceedings against the debtor, the parties had agreed on a redemption sum on a said property for the amount of RM1,750,000 and 10% of this sum was paid to the bank on 6 November 1989. The formal agreement for the sale of the said land was executed on 8 November l989. This agreement recited that the bank had agreed to accept RM1,750,000 as redemption sum for the charge on the said land. The debtor whose personal liability arose on the basis of a guarantee, and who was also the owner of the said land, contended that by this arrangement the bank had agreed to accept the RM1,750,000 in full settlement of the debt due to the bank.

The creditor's petition together with the affidavit-in-support affirmed by the bank's manager disclosed that the bank indeed received RM175,000 on 6 November 1989, and a further sum of of RM1,575,000 on 22 December 1989 being the proceeds of the sale of the said property. But this affidavit was silent on the issue of whether it was agreed that RM1,750,000 was the agreed redemption sum. There was a denial that RM1,750,000 was agreed to be accepted in settlement of the debt due to the bank.

The issue before the Court was whether between the date of the bankruptcy notice and the date on which it was served, the amount due on the judgment debt had been reduced by RM175,000. On the face of the evidence before the Court, the Court was satisfied that there was a genuine triable case of set-off, and that the said issue went to the root of the judgment debt.

Held:

[1] It is clear that a bankruptcy notice which at the time of service claims for more than is legally due is bad, because the amount in the bankruptcy notice is not due. The facts disclosed in the affidavits compelled the Court to the conclusion that the bankruptcy notice was defective.

[2] In the absence of clear evidence that s. 60 of the Contracts Act 1950 did not apply, there are triable issues which must also result in the notice being set aside.

[Bankruptcy notice set aside; creditor's petitition dismissed with costs.]

Cases referred to:
Re Saloma in Ex-parte Ipoh Radio Co. [1963] 29 MLJ 46 ***(foll)***
Ghazali bin Mat Noor v. Southern Bank Bhd. [1989] 1 CLJ (Rep) 35 ***(cons)***

Legislation referred to:
Bankruptcy Rules 1969, r. 95
Contracts Act 1950, s. 60
Rules of the Hight Court 1980, O. 42 r. 12

For the appellant - Saidah Rastam; M/s. Skrine & Co.
For the respondent - M.K. Ng; M/s. Y.L. Tho & Partners

JUDGMENT

Mahadev Shankar J:

Ng Weng @ Ng Kam Weng (Ng) was the owner of land in Petaling Jaya (the said land) which he charged to the Development and Commercial Bank Kuala Lumpur (the bank) on 17 September 1977 to secure repayment of sums advanced by the bank to Poh Lee Enterprise Sdn. Bhd. (Poh Lee).

On 18 July 1983 Ng created a second charge over the said land to secure the repayment of sums advanced by the bank to Ng Kam Weng Holding (M) Sdn. Bhd. (the company).

On 15 December 1988 the bank obtained a judgment against the company, Ng and one Loh Lye Yoong (f) for the sum of RM1,193,659.10 together with interest thereon at 12.5% p.a. with monthly rests from 1 May 1988 till full payment and RM380 costs. This judgment was against Ng as guarantor.

Based on this judgment, on 31 October 1988, the bank filed a request for issue of a bankruptcy notice against Ng alone. The bankruptcy notice was issued the same day. The decretal amount of RM1,193,659.10 is shown as the principal sum. Then there is shown interest calculations purportedly at 12.5% p.a. with monthly rests. Also shown are payments made by the debtor on various dates in each calendar month following. Interest was in fact calculated by days in each month up to the payment, and then on the nett amount after reduction to the end of that month and compounded by way of "monthly rest." (No submission has been made to me on the legality of this, and I do not propose to say more about this except to refer to the Article on O. 42 r. 12 of the Rules of the High Court 1980 appearing in [1987] 2 MLJ at p.ccx). The bankruptcy was issued on 31 October 1989 against Ng for RM1,326,690.12 which included the interest so calculated and the RM380 costs.

In November 1989 obviously with the consent of the bank, it was agreed that the redemption sum on the said land be agreed at RM1,750,000 which was the price at which Ng agreed to sell the same to a company called Sea Tackle Sdn. Bhd. 10% of this amount was paid to and received by the bank on 6 November 1989.

The formal agreement for the sale of the said land was executed on 8 November 1989. This agreement recites that the bank had agreed to accept RM1,750,000 as the redemption sum for the charge on the said land. Ng's contention is that by this arrangement the bank had agreed to accept the RM1,750,000 in full settlement of the debt due to the bank.

On 6 December 1989 Ng went to the bank's solicitor's office. There at 11.57 a.m. precisely he was served with the bankruptcy notice. By 13 December 1989 that is within seven days he affirmed and filed an affidavit in these proceedings contending that RM175,000 had already been paid towards the debt shown in the bankruptcy notice, and that the bank had agreed to accept RM1,750,000 in settlement of its debt and was estopped from proceeding further.

a On 16 April 1990 the bank's solicitors asked the Court to fix a date for the disposal of this affidavit which it regarded as an application to set aside the bankruptcy notice in accordance with s. 95 of the Bankruptcy Rules 1969.

Before receiving a reply from the Court the bank's solicitors filed a creditor's petition on 9 June 1990. The alleged act of bankruptcy relied upon is Ng's alleged failure to comply with the bankruptcy notice dated 31 October 1989 which was served upon him on 6 December *b* 1989. The act of bankruptcy is alleged to have occurred on 14 December 1989.

The "application" to set aside the bankruptcy notice was fixed for disposal before me on 30 August 1990.

Meanwhile the creditor's petition was served on 5 July 1990. I have noted that all items in this creditor's petition are identical to the bankruptcy notice up to the RM1,326,690.12 claimed *c* to be due up to 31 October 1989. However thereafter there follows in the creditor's petition the following further items:

	Brought Forward	**RM1,326,690.12**
d	Interest on RM1,326,690.12 at the rate of 12.50% per annum with monthly rests from 1 November 1989 to 30 November 1989 (30 days).	13,626.47
		RM1,340,316.59
e	Interest on RM1,339,936.59 at the rate of 12.50%per annum with monthly rests from 1 December 1989 to 21 December 1989 (21 days)	9,636.53
		RM1,349,953.12
f	Proceeds of sale on 22 December 1989. (RM1,750,000 - RM1,179,486.46 first legal charge - Poh Lee Enterprise (M) Sdn. Bhd.)	570,513.54
		RM 779,439.58

It is not clear from this what happened to the RM175,000 received on 6 November 1989. *g* RM1,750,000 is shown as the proceeds of sale on 22 December 1989. This sum appears to have been applied to the indebtedness of Poh Lee leaving a credit of RM570,513.54 which has left a debit it seems of RM779,439.58 still due from Ng.

It is necessary at this stage to emphasise that the bankruptcy notice was issued to Ng alone. The property sold was also his. The judgment debt which was the subject of the bankruptcy notice had its basis in his personal liability as a guarantor.

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The creditors petition was served on 5 July 1990. On 9 August 1990 the bank's manager affirmed an affidavit in which it is disclosed that the bank indeed received RM175,000 on 6 November 1989, and a further sum of RM1,575,000 on 22 December 1989 being the proceeds of the sale of the said property.

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But this affidavit is silent on the issue of whether it was agreed that RM1,750,000 was the agreed redemption sum. It merely avers that it was appropriated to the first charge, and the balance appropriated to the account of the indebtedness of Ng Kam Weng Holding (M) Sdn. Bhd. to the bank. There is a denial that RM1,750,000 was agreed to be accepted in settlement of debt due to the bank.

One of the objections taken by the bank's Counsel was that this application should have been made by motion and not by summary affidavit procedure because the debtor was not claiming a genuine triable set-off which equals or exceeds the judgment debt but was seeking to set aside the notice on other grounds. I regret that this objection did not find favour with me. Not only was it a mere irregularity but the objection was not taken *in limine.* The issue before me was whether the facts disclosed in the affidavits compelled me to the conclusion that the bankruptcy notice was defective.

Encik M.K. Ng for the debtor referred me to *Re Saloma in Ex parte Ipoh Radio Co.* [1963] 29 MLJ 46. Between the date of the bankruptcy notice (that is 31 October 1989) and the date on which it was served (that is 6 December 1989) the amount due on the judgment debt of Ng had been reduced by RM175,000 whichever way one looks at it. The case just cited makes it clear that a bankruptcy notice which at the time of service claims for more than is legally due is bad, because the amount in the bankruptcy notice is not due. That really disposes of this matter.

Ghazali bin Mat Noor v. Southern Bank Bhd. [1989] 1 CLJ (Rep) 35 is another aspect of the same principle. For the bankruptcy notice to be valid it should state the exact amount due not only at the date of bankruptcy notice but also on the date on which it is served on the debtor. That was manifestly not done in this case.

This case is complicated by another issue. Mr. Ng's debt stated on the bankruptcy notice was RM1,326,690.12. The RM1,750,000 paid to the bank represented the sum due to him as vendor from the purchaser. Ng claims:

(1) that such a payment effectively discharged his entire debt stipulated in the bankruptcy notice and

(2) that the payment also discharged the total debt due to the bank.

Poh Lee and the company to whom the bank presumably advanced the moneys secured on the first and second charges are different entities from Ng personally. To constitute mutuality of debts, credits or dealings it is necessary that these transactions for or against the bank on one side and its debtors in bankruptcy proceedings, should be between the same parties. I have not had the benefit of any argument on this aspect of the matter from either Counsel. I need therefore only say that in the absence of rebutting evidence it is a fair inference that when Ng sold his land he intended that the proceeds should be used to extinguish his personal indebtedness to the bank.

If Mr. Ng is correct the bank must fail. The bank manager's denial merely puts the matter in issue. In parallel with the approach which the Court must take in determining whether there is a genuine triable case of set-off, if I had to resolve this matter at this level, I would have had to satisfy myself that this was a genuine triable issue which went to the root of **the judgment debt of Ng**. On the evidence before me it obviously does. The bare denial of the bank manager does not make it any less a triable issue. Clearly there must have been some discussions between the parties leading to the agreement by Ng and the bank that the

property may be sold for RM1,750,000 and redeemed for that amount. In the absence of clear evidence that s. 60 of the Contracts Act 1950 was not to apply, as Ng now contends, there are triable issues which must also result in the notice being set aside.

At the end of Counsel's submission, I set aside the bankruptcy notice. I must follow that the creditor's petition based thereon should be dismissed with costs also and I make that order now the deposit must be paid to Ng towards his taxed costs.

Also found at [1992] 1 CLJ 457